Ref. No. 311

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

UNITED STATES OF AMERICA,
Complainant,

vs.

HONEYBAKE FARMS, INCORPORATED,
Respondent.

8 U.S.C. §1324a
PROCEEDING

OCAHO Case
No. 90100344

FINAL DECISION AND ORDER
SETTING PENALTY AMOUNT

1. Procedural Facts

A Complaint was filed on November 19, 1990 by the United States of America with the Office of the Chief Administrative Hearing Officer.

The Complaint alleges that Respondent Honeybake Farms, Inc. has failed to properly verify the employment eligibility of eight employees in violation of the paperwork requirements contained at 8 U.S.C. §§1324a(a)(1)(B), (b).

On January 25, 1991, Complainant filed a Motion for Partial Summary Decision. In it, Complainant argues there exist no genuine disputed liability issues in this case. Respondent subsequently filed a Response to Complainant's motion.

On March 7, 1991, I issued a Decision and Order Granting Complainant's Motion for Partial Summary Decision. Said Decision and Order disposed of all liability issues in favor of the Complainant. In that Order, I further directed the parties to file affidavits or other written evidence and arguments addressing the civil money penalty issue in this case. I required the parties to file any evidence and arguments addressing that issue no later than March 21, 1991.

On March 20, 1991, Complainant timely filed a Memorandum in Support of Complainant's Fine Assessment. Respondent, on the other hand, did not file any evidence or arguments addressing the penalty issue until April 1, 1991. Since Respondent's memorandum on the penalty issue is clearly untimely, it will not be considered by this court.

2. Civil Money Penalties

The Immigration Reform and Control Act of 1986 ("IRCA") requires employers to pay a civil money penalty whenever they are found to have violated IRCA's paperwork requirements. The level of civil money penalty is determined only after a consideration of five statutory penalty factors [8 U.S.C. §1324a(e)(5); 28 C.F.R. §68.50(c)(2)(iv)]; though the actual amount of the fine may vary from a minimum of One Hundred Dollars to a maximum of One Thousand Dollars per violation. See 8 U.S.C. §1324a(e)(3).

The five statutory factors that must be considered in setting the fine for paperwork violations are: 1) size of the employer's business; 2) employer's good faith; 3) seriousness of the violations; 4) whether the violations resulted in the actual employment of unauthorized aliens; and 5) whether the employer has a history of previous violations.

For two of the eight paperwork violations, Complainant seeks the minimum One Hundred Dollars fine against the Respondent. In four other instances, Complainant proposes a One Hundred and Fifty Dollars fine for each of those violations. Complainant also seeks a Two Hundred Dollars penalty against the Respondent for each of the remaining two violations. The total penalty proposed by the Complainant therefore amounts to One Thousand and Two Hundred Dollars.

Complainant argues that its proposed penalty amount should be sustained since it has considered each of the five statutory factors before arriving at the proposed penalty.

Since Complainant seeks only the minimum penalty in two cases, I find Complainant's proposed penalty assessment is fully justified for those two violations. Therefore, Respondent's should pay the minimum One Hundred Dollars fine for its failure to properly complete the employment eligibility verification form ("I-9" form) for Leroy Chisum, Jr.. Respondent must pay another One Hundred Dollars penalty for its failure to properly complete the I-9 of Maria Moya.

[illegible] propriety of Complainant's proposed
[illegible]ng six violations in light of the

A. Size of Employer's Business

Complainant states that it has no information on this penalty factor because Respondent did not answer interrogatories which had inquired into the extent of Respondent's work force and sales volume. Since the parties have not offered any information which addresses the size of Respondent's business, this factor can

neither aggravate nor mitigate the penalty amount.

B. Employer's Good Faith

Although "good faith" is not defined by the statute and the relevant regulations, there should be some evidence of culpable behavior beyond mere ignorance on the part of the Respondent before this factor can serve to aggravate the penalty amount. See United States v. Lola O'Brien d/b/a O'Brien Oil Company, OCAHO Case No. 89100386, May 2, 1990.

Complainant argues that Respondent did not evince good faith compliance with the paperwork requirements because he has already been educated as to those requirements on April 16, 1990. Complainant adds that Respondent has previously been warned of similar paperwork violations after an inspection conducted by the INS on April 20, 1990. The Declaration of INS agent Lyle Wutke and the photocopy of a "Warning Notice" support these contentions. Complainant concludes that such evidence demonstrates Respondent has failed to diligently ensure the proper completion of the I-9s and that such lack of diligence constitutes bad faith compliance.

Based on the above, I find Respondent has knowledge of the paperwork requirements. However, Respondent's knowledge does not necessarily lead to the conclusion that it has acted in bad faith. I note that there is no evidence indicating Respondent to have been uncooperative with the INS during the inspection process. Moreover, the current violations involve mostly minor paperwork discrepancies. While such minor discrepancies may constitute "serious" violations in view of IRCA's legislative intent, they also tend to indicate Respondent did not engage in bad faith compliance with the statute despite its knowledge of IRCA's paperwork requirements.

The evidence does not indicate significant culpable
by the Respondent. Therefore, this factor does not
aggravate the penalty amount.

C. Seriousness of the Viola

Complainant asserts Respon
"serious" because they involve def
employment of unauthorized aliens
discussed each of the relevant I-
how each of the I-9s might have
unauthorized alien.

On several of the I-9s, eit
has failed to affix his or her
blank. At times, the employer or

I-9. In one instance, an improper document (a baptismal certificate) was accepted by the employer as documentation of identity. In another instance, the employer failed to record any employment eligibility document in Part 2 of the I-9 form (though it is noted that the employee has included her amnesty number and the expiration date of her employment authorization in Part 1 of the form and the employer has certified that it had inspected the employment eligibility documents).

The acceptance of improper documentation is a "serious" violation in that it may render ineffective the Congressional prohibition on the employment of unauthorized alien. However, I am not persuaded that the other instances of paperwork violation in this case are "serious" even according to the Complainant's own standard of evaluation.

Failure by an employer to sign the I-9, when the employee has signed the form, or vice-versa, may inconvenience any potential prosecution for fraud, but it does not necessarily increase the likelihood of an unauthorized alien being employed in the United States. Similarly, failure to date the I-9, in light of the fact that it has been dated by another party, does not necessarily render the employment of an unauthorized alien more likely. Failure by the employer to record the employee's work authorization documentation, when the employee has already done so and when the employer has certified that he has verified the employee's eligibility, also does not significantly increase the likelihood of an unlawful employment.

It is possible that all the violations enumerated here may be "serious" under certain circumstances. However, they cannot automatically be characterized as "serious" in this case especially since none of the employees who are the subject of the current action are unauthorized aliens.

In view of the above discussion, I find this factor only slightly aggravates the overall penalty amount. In particular, it aggravates the penalty only with respect to Respondent's failure to use an acceptable identity document for Doris Malagon.

D. Unauthorized Status of Employees

Complainant does not assert that any of the instant eight individuals employed by the Respondent are unauthorized aliens. This factor therefore mitigates the instant penalty.

E. History of Previous Violations

Complainant contends that a "history of previous violations" can be established by a prior "warning notice" against the

Respondent. Evidence of a previous warning by the INS demonstrates that Respondent's has a prior "history" of contact with the IRCA enforcement process: however, it does not establish an IRCA violation. A "warning notice" does not contain any formal judgment or admission regarding Respondent's liability for prior IRCA violations.

IRCA affords employers the opportunity for a hearing before he or she can be adjudged as having violated the IRCA provisions. In the absence of an opportunity for a hearing that conforms to constitutional due process requirements, Respondent's prior "misconduct" cannot be characterized as an IRCA "violation" for penalty aggravation purposes. See United States v. Lola O'Brien d/b/a Wexford Farms, OCAHO Case No. 89100387, May 2, 1990.

Therefore, rather than aggravating the instant penalty, this factor in fact mitigates it.

Upon consideration of the statutorily mandated penalty factors, I find that the minimum civil money penalty of One Hundred Dollars ($100) is appropriate for seven of the eight instances of paperwork violations in this case. In addition, a Two Hundred Dollars ($200) civil money penalty is appropriate for Respondent's improper completion of Doris Malagon's I-9 form. Thus, the total civil money penalty in this case is set at Nine Hundred Dollars ($900).

3. Findings of Fact and Conclusions of Law

Based upon the showing provided by the Complainant, and in accordance with my March 7, 1991 Decision and Order Granting Complainant's Motion for Partial Summary Decision, I conclude:

A. That Respondent violated 8 U.S.C. §1324a(a)(1)(B), in that Respondent hired eight individuals for employment in the United States, after November 6, 1986, without complying with the verification requirements contained in 8 U.S.C. §1324a(b). The eight individuals are: Mary Hernandez, Leroy Chisum, Jr., Maria Moya, Doris Malagon, Jose Sanchez, Gary Franklin, Bertha Gonzalez, and Flennard Smith.

B. That pursuant to 28 C.F.R. §68.50(c)(2)(iv), Respondent is required to pay a civil money penalty in the amount of Seven Hundred Dollars for seven paperwork violations (One Hundred Dollars for each of the seven violations). Respondent must also pay a Two Hundred Dollars penalty for an additional paperwork violation. The total penalty in this case amounts to Nine Hundred Dollars ($900).

ORDER

Respondent Honeybake Farm, Inc. is ordered to pay to the Complainant a civil money penalty of Nine Hundred Dollars ($900) for eight violations of 8 U.S.C. §1324a(a)(1)(B).

The hearing previously scheduled in this matter is hereby canceled.

That, pursuant to 8 U.S.C. §1324a(e)(7), and as provided in 28 C.F.R. §68.51, this Decision and Order shall become the final decision and order of the Attorney General unless, within five (5) days of the date of this decision any party files a written request for review of the decision together with supporting arguments with the Chief Administrative Hearing Officer.

JAY R. POLLACK
Administrative Law Judge

San Francisco, California
Dated: April 2, 1991

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